Rangaire Acquisition Corporation and GSL Rangaire Corporation d/b/a Rangaire Company *and* Allied Industrial Workers of America, Local 424. Cases 16–CA–14967 and 16–CA–15039

December 16, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

This case involves alleged violations by the Respondent of Section 8(a)(5) of the Act.[1] The judge has found that the Respondent unlawfully modified contractual workweek schedules without the Union's consent and locked out employees in an attempt to coerce them and the Union to consent to midterm modification of terms in a collective-bargaining agreement with the Union. He further found that the Respondent did not violate Section 8(a)(5) by unilaterally departing from a past practice of giving unit employees an extra paid 15 minutes for lunchbreak on Thanksgiving.[2]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions, except with respect to the lunchbreak issue, and to adopt the recommended Order as modified. For the reasons set forth below, we find that the unilateral denial of an extended Thanksgiving lunchbreak was unlawful.

According to credited testimony, an extra paid 15 minutes for the Thanksgiving lunchbreak was a longstanding practice when the Respondent took control of operations at the Cleburne, Texas plant in 1989 and agreed to assume the obligations of the predecessor's collective-bargaining agreement with the Union. The Respondent honored the past practice of an extended break for Thanksgiving 1989. In November 1990, the Respondent's president, Joe McKenzie, unilaterally denied an extended break for Thanksgiving. McKenzie testifed that he calculated the total cost of an extended paid lunchbreak and determined that the Respondent could not afford it.

Although finding that there was an established past practice of an extended paid Thanksgiving lunchbreak, the judge found that the single denial of a 15-minute break did not involve a material, substantial, and significant change in unit employees' terms and conditions of employment. Accordingly, the judge concluded that the denial of an extended Thanksgiving lunchbreak did not violate Section 8(a)(5) of the Act. We disagree.

It is correct that a unilateral change in a mandatory subject of bargaining is unlawful only if it is ''material, substantial, and significant.''[4] The Board has previously found, however, that an employer's single unilateral refusal to adhere to a past practice of a paid extra half hour for lunch on Christmas Eve violated Section 8(a)(5). *Litton Systems*, 300 NLRB 324, 331 fn. 34 (1990), enfd. 949 F.2d 249, 251–252 (8th Cir. 1991). The difference between the 30-minute paid break in *Litton* and the 15-minute paid break here does not define the difference between substantial and de minimis.[5] On the contrary, the Respondent's own witness has effectively acknowledged the substantiality of the 15-minute Thanksgiving break by claiming the economic necessity of eliminating it. We find that the unilateral discontinuation of the break entailed a material, substantial, and significant change in unit employees' wages and working conditions. The Respondent therefore violated Section 8(a)(5).[6]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Rangaire Acquisition Corporation and GSL Rangaire Corporation d/b/a Rangaire Company, Cleburne, Texas,

[1] On August 25, 1992, Administrative Law Judge William J. Pannier III issued the attached decision. The Respondent and the General Counsel each filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The judge also found that the Respondent lawfully refused to continue union dues checkoffs after expiration of the parties' collective-bargaining agreement. There are no exceptions to this finding.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge credited former Personnel Manager Cathy Stevens' testimony that a man tentatively identified as Goodhue Smith stated, ''let's shut it down and let them think about it.'' In crediting Stevens, the judge relied in part on the failure of the Respondent to call Smith to testify. We adopt the judge's credibility resolution, but find it unnecessary to pass on this basis for crediting Stevens, as the judge found that Stevens had testified candidly and that her testimony was reinforced by other evidence.

[4] *Alamo Cement Co.*, 281 NLRB 737, 738 (1986).

[5] The judge mistakenly found the unilateral change in the lunchbreak practice here comparable to the installation of an employee break buzzer system which the Board majority in *Litton* found did not entail a ''material, substantial, and significant'' change. The installation of the buzzer system did not alter the official time allotted for employee breaks. At the most, it deprived some employees of a grace period of a couple of minutes in transit to and from their breaks. 300 NLRB at 331–332 (Chairman Stephens dissenting).

[6] We shall modify the remedy to include provisions for the Respondent to reinstate the past practice for Thanksgiving lunchbreak and to make whole unit employees for losses suffered as a result of the unlawful unilateral repudiation of that practice. Interest on backpay shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(c) and reletter the subsequent paragraph.

''(c) Unilaterally refusing to adhere to an established past practice of providing unit employees with an extra paid 15 minutes for lunch on Thanksgiving.''

2. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.

''(c) Make whole, with interest, all bargaining unit employees for the unilateral recission of the extra paid 15 minutes for lunch on Thanksgiving, and reinstate the established past practice with respect to the Thanksgiving lunchbreak.''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT change or modify contractually specified workweek schedules, or any other contract term and condition, during the effective term of a collective-bargaining contract with Allied Industrial Workers of America, Local 424, as the collective-bargaining agent of employees in an appropriate bargaining unit of:

> All production and maintenance employees employed by Rangaire Acquisition Corporation and GSL Rangaire Corporation d/b/a Rangaire Company at its Cleburne, Texas, facility; excluding office clerical employees, draftsmen, engineering technicians, professional employees, guards, watchmen and supervisors as defined in the National Labor Relations Act.

WE WILL NOT lock out, lay off, or otherwise attempt to coerce you into accepting changes in the terms and conditions of a collective-bargaining contract during its effective term.

WE WILL NOT unilaterally refuse to adhere to an established past practice of providing unit employees with an extra paid 15 minutes for lunch on Thanksgiving.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL adhere to the workweek schedules and other terms and conditions set forth in collective-bargaining contracts with Allied Industrial Workers of America, Local 424, as the collective-bargaining agent of employees in the appropriate bargaining unit described above, unless we first obtain the uncoerced agreement of that labor organization.

WE WILL make whole, with interest, all unit employees for any loss of pay and benefits they suffered because they were unlawfully locked out on October 31 and on November 5 and 6, 1990, and because of unlawful changes in their contractually specified workweek schedules from November 27 to December 3, 1990.

WE WILL make whole, with interest, all bargaining unit employees for our unlawful recission of the extra paid 15 minutes for lunch on Thanksgiving, and WE WILL reinstate the established past practice with respect to the Thanksgiving lunchbreak.

RANGAIRE ACQUISITION CORPORATION AND GSL RANGAIRE CORPORATION D/B/A RANGAIRE COMPANY

Elizabeth J. Kilpatrick, for the General Counsel.
John E. McFall, William O. Ashcraft and *Eric J. Senske (McFall & Ashcraft)*, of Dallas, Texas, appearing for the Respondent.
Jim Gattis, of Fort Smith, Arkansas, appearing for the Union.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case in Fort Worth, Texas, on October 16 and 17, 1991. On July 2, 1991, the Regional Director for Region 16 of the National Labor Relations Board (the Board) issued an order consolidating cases, consolidated complaint and notice of hearing, based on an unfair labor practice charge filed in Case 16–CA–14967 on March 26, 1991, and on an unfair labor practice charge filed in Case 16–CA–15039 on May 8, 1991, alleging violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record, upon the briefs that were filed, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material Rangaire Acquisition Corporation and GSL Rangaire Corporation d/b/a Rangaire Company (Respondent)[1] has been a Texas corporation with an office and place of business in Cleburne, Texas, and has engaged in the manufacture and nonretail sale of electrical appliances and related products. In the course and conduct of those operations during the 12-month period preceding issuance of the consolidated complaint, Respondent purchased and received for use at its Cleburne facility goods and material valued in excess of $50,000 directly from suppliers located outside the State of Texas. Therefore, I conclude, as admitted in Respondent's original answer to consolidated complaint, that at all times material Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

At all times material, Allied Industrial Workers of America, Local 424 (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

Oven hoods, fluorescent light fixtures, and chest freezers have been manufactured by Respondent at the Cleburne plant since June 1989. Prior to that month and year the plant had been owned and operated by Scottish Heritables, Inc. Moreover, since at least 1976, the Union had been recognized as the bargaining representative of employees working there in an admittedly appropriate bargaining unit of all production and maintenance employees, excluding office clerical employees, draftsmen, engineering technicians, professional employees, guards, watchmen, and supervisors as defined in the Act. A series of collective-bargaining contracts had been negotiated and executed by the parties. The most recent one prior to June 1989 had been signed on April 15, 1987.

In June 1989 the Cleburne plant and related assets were purchased by Respondent, a joint venture of two subsidiary corporations: GSL Rangaire Corporation and Rangaire Acquisition Corporation. The former is a group of investors put together by Duncan Smith Investment Group. That group owns 34 percent of Respondent. Rangaire Acquisition Corporation was formed by five investors to acquire the Cleburne plant and its assets. One of them is Joe Petty, the owner of five percent of Rangaire Acquisition Corporation and the individual who served as Respondent's president until he resigned effective October 31, 1990. A second investor is Billie Henderson. At all times material she has been Respondent's controller and has owned 2 percent of Rangaire Acquisition Corporation. Forty-four percent of it is owned by Joe McKenzie, an admitted statutory supervisor and agent of Respondent who serves as Respondent's chairman of the board and, since Petty's resignation, as its president, as well.

Most of the complaint's allegations arise from convergence of two aspects of the purchase of assets in 1990. In addition to money put up by the investors and subordinated debt taken back by the seller, the asset purchase was financed by Barclays Business Credit, Inc. By loan and security agreement, it extended to Respondent a fixed asset loan and a working capital loan. Second, McKenzie decided not only to continue recognizing the Union as the production and maintenance employees' representative, but also to adopt the contract signed on April 15, 1987, then scheduled to expire on April 25, 1990. With regard to its term, that contract provided for annual renewal after April 25, 1990, absent timely notice of desire to amend, change, or terminate it. Timely notice did occur in 1990. But, following two short-term extensions of the contract, the parties executed a Memorandum of Understanding, agreeing to extend it with modifications until April 25, 1991.

After June 1990 Respondent's operations were less than anticipated. In fact, it suffered losses during each succeeding month. In consequence, Barclays began more closely scrutinizing operations of Respondent which, ultimately, was subjected to a forbearance agreement and successive amendments thereto. In an effort to comply and to achieve profitability, Respondent formulated a restructuring plan. That plan was a multifaceted program. One aspect of it contemplated reductions in wages and certain benefits prescribed in the 1987–1990 contract, as extended and modified.

During October and early November 1990 Respondent made efforts, described more fully in subsection III,B, infra, to persuade the Union, and the employees that it represented, to modify the contract by accepting the restructuring plan's proposed concessions. Ultimately, a majority of the employees rejected Respondent's proposal in an election conducted among them on November 14, 1990. However, during the preceding 15 calendar days the plant had been closed, and all unit employees laid off, on 3 days: Wednesday, October 31; Monday, November 5; and, Tuesday, November 6, 1990. The General Counsel alleges that those closures and consequent layoffs had been designed by Respondent to coerce the employees into accepting midterm modifications of the collective-bargaining contract, something which no party could demand, and, accordingly, constituted unlawful lockouts that violated Section 8(a)(5) and (1) of the Act. For the reasons set forth subsection III,B, infra, a preponderance of the evidence supports that allegation.

The General Counsel also alleges that Respondent violated Section 8(a)(5) and (1) of the Act by denying the unit employees' request for a Thanksgiving lunchbreak extended by 15 minutes in 1990. In fact, the record establishes that, while not required by the contract, for approximately a decade there had been a practice of allowing 15 minutes extra for Thanksgiving lunchbreak. Indeed, Respondent, itself, observed that practice during 1989. Moreover, it is undisputed that McKenzie made the decision not to grant it in 1990 without providing prior notice to the Union. Nevertheless, as discussed in subsection III,C, infra, it has not been established that the extended break constituted a material, substantial and significant employment term and condition. Consequently, its disallowance in 1990 did not violate Section 8(a)(5) and (1) of the Act.

In addition, the complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act by changing the workweek schedule for some unit employees from the 8-hour, 5-day one specified in the collective-bargaining contract to a 10-

[1] As amended at the hearing.

hour, 4-day one from November 27 to December 3, 1990. There is no dispute that the change had never received the Union's agreement. Accordingly, for the reasons set forth in subsection III,D, infra, I conclude that a preponderance of the evidence supports the allegation that the schedule change violated Section 8(a)(5) and (1) of the Act.

Finally, the General Counsel contends that Respondent has violated Section 8(a)(5) and (1) of the Act since April 25, 1991, by discontinuing dues deductions required by the collective-bargaining contract for employees who executed checkoff authorizations. Underlying that allegation are the subsidiary issues of whether, under the terms of the above-noted 1-year extension, the contract would renew annually absent timely notice of intent to amend, change, or terminate it, and, second, whether Respondent in fact gave that timely notice in 1991. As discussed in subsection III,E, infra, regardless of the contract interpretation issue, a preponderance of the evidence supports the argument that the Union had received notice from Respondent in time to prevent automatic contract renewal. Inasmuch as union security and checkoff are subjects that do not survive expiration of a collective-bargaining contract, I conclude that Respondent did not violate the Act by discontinuing dues deduction after the contract had expired without agreement on the terms for a succeeding contract. Consequently, I grant Respondent's motion to dismiss this allegation of the complaint.

B. *The Layoffs of October 31 and November 5 and 6, 1990*

The layoffs on these 3 days were part of a series of pertinent events that occurred during October and November 1990. By the beginning of October Respondent's financial situation had deteriorated to the point of precariousness. During the first half of October Respondent reviewed the terms of its restructuring plan with members of the employee bargaining committee—Sam Shivers, committee president; Sherrie Barber, chairperson; Virgie McComas; Mike Whitehead; and, Jeff Shirley—and with Business Manager Smith Harris, then serving as the official who was responsible for handling the Union's relations with Respondent. The plan contemplated modification of the collective-bargaining contract by allowing Respondent concessions in certain of its terms. To support its assertions of economic necessity for these concessions, Respondent offered to open its books for inspection. The Union accepted that offer and agreed to undertake an inspection of Respondent's financial records, although, in doing so, there is no evidence that it made any agreement concerning concessions should the books confirm Respondent's description of its adverse financial situation.

Meetings to inspect the records took place on Monday, October 29 and on Tuesday, October 30. By those dates a reassignment of union personnel had resulted in replacement of Harris by Region 8 Regional Representative Jim Gattis as the individual servicing Respondent's employees. Accompanying Gattis to those late October meetings was Steve Hendrickson, an expert on analyzing financial records who was employed as director of research by the Union's International body. After a tour of Respondent's plant on October 19, Hendrickson began to examine the monthly records (general ledger, profit and loss statements, balance sheets, cash availability reports, etc.) arranged for inspection in Respondent's conference room. Although there is some dispute regarding the length of time Hendrickson actually spent there looking at records, it is uncontroverted that he collected some of those documents which he placed in an accordion file and took to his hotel room. There, he spent the remainder of that day and that evening, as well as the following morning, examining those records.

Returning to Respondent's plant after lunch on Tuesday, October 30, Hendrickson returned the documents and asked for certain additional ones which Controller Henderson promised to transmit after she had located and assembled them. More importantly, Gattis testified that McKenzie had asked when the Union would respond concerning Respondent's request for concessions and that he had replied that, before negotiations could be undertaken regarding the restructuring plan's proposed concessions, there first had to be an election among the employees to determine whether a majority of them were willing to reopen the contract for those negotiations. Gattis further testified, without contradiction, that McKenzie ''became visibly upset and said, 'No, I'm not talking about a vote to open the contract. I'm talking about a vote to put these concessions in place.''' After repeating that there first had to be an election on whether to reopen the contract, testified Gattis without contradiction, he had pointed out that even if an employee majority voted in favor of reopening the contract, the Union did not necessarily consent to Respondent's proposed concessions and there would need to be negotiations about them, with the Union wanting to propose some items in exchange for concessions. Gattis testified that McKenzie had retorted simply that nothing was negotiable. McKenzie testified that his statement had been ''that the bank was not in very much of a negotiating mood,'' with the result ''that the bank had me in a position of not being negotiable.'' The most crucial point about this meeting is that at no point during it—nor, for that matter, at any time before it—did any of Respondent's officials say anything about closing the plant, nor about laying off the production and maintenance employees who worked there.

Shortly after Gattis and Hendrickson left the Cleburne plant on October 30, however, then-Personnel Manager Cathy Stevens posted notices stating that the plant would be closed on Wednesday, October 31. Those notices further recited that the personnel office should be contacted ''to see if Plant will be open on Thursday.'' After the 3:30 quitting time, the bargaining committee met with Gattis and, for the first time, he learned of the closure. He testified that, in view of it, he felt there probably was no need to hold an emergency meeting with the employees and that the subject of reopening the contract could be deferred to the regular monthly membership meeting, then scheduled for Tuesday, November 6. Accordingly, he returned to Little Rock, Arkansas, the location of his home and office.

The plant was closed on Wednesday, October 31. But it reopened on Thursday, November 1, with employees returning to work at their normal starting time of 7 a.m. McKenzie met with them at 9 a.m. During that meeting, he ''reiterated the financial situation of the company, that we needed to have concessions to continue to survive.'' The restructuring plan's proposals were read to the assembled employees. When one of them asked ''what happens if the company can't make the payroll,'' testified McKenzie, ''I told them at that point in time, that for the rest of the week, if this plant

couldn't make the payroll, then I would pay it personally. But that was for that week only.''

Following that meeting the bargaining committee members spoke with McKenzie. He implored them ''to try to get something together so these people could vote on [Respondent's] . . . proposals [it] had offered,'' adding that the matter had to be resolved by the next day, Friday, November 2. He excused the committee members from work. They used that time off to contact Gattis in Arkansas and, with his acquiescence, to arrange a membership meeting for 1 p.m. on Friday, November 2. The employees were excused from work to attend that meeting. At it, however, a majority of them voted against reopening the contract.

Prior to midnight on Sunday evening, notices were posted on the plant doors stating that it would be closed until further notice. As had been true of the October 31 closure, it is undisputed that no prior notice was given to the Union of the closure on Monday, November 5. Nor was prior notice given to the Union that the plant would be closed on Tuesday, November 6, as well. In fact, it was closed on both days. But during the morning of the second day Chairperson Barber was called by Stevens who asked if the committee would meet with Respondent's officials. At that meeting modified concessions were proposed and the committee was asked to take another vote on reopening the contract. The committee also was told that the plant had been closed due to financial difficulties, but it is undisputed that Controller Henderson promised to ''see to it that the plant would remain open despite the problems that they were having financially.'' In fact the plant did reopen on Wednesday, November 7, and has remained in operation continuously since that date.

A majority of the employees did vote in favor of reopening the contract. However, no solution to Respondent's financial difficulties resulted from that election. Negotiations were conducted at a meeting on November 14, principally between Gattis and Bill Cole, Respondent's materials manager and an admitted statutory supervisor and agent of Respondent. But despite Respondent's presentation of a further modified concessions program during that meeting, a majority of the employees voted on that date against agreeing to modify their collective-bargaining contract's existing terms and conditions. That election terminated all further consideration of contractual modifications.

Respondent contends that the layoffs had been necessitated by a shortage of funds that, had it allowed the employees to work on October 31 and on November 5 and 6, and issued paychecks to them for doing so, would have subjected it to financial penalties under the Texas Payday Law. The General Counsel, however, alleges that the 3 days of layoff constituted successive lockouts, each designed to coerce the employees into consenting to midterm modifications of contract terms. That allegation is based on certain well-settled principles. Because layoffs effect a material, substantial and significant change in terms and conditions of employment, prior notification about them must be afforded the affected employees' bargaining agent. See, e.g., *Ladies' Garment Workers Local 512 v. NLRB*, 795 F.2d 705, 710–711 (9th Cir. 1986). This is so regardless of the employer's good faith or lack of unlawful motivation for laying off represented employees. ''Proof of violation of Section 8(a)(5) by showing unilateral changes may not be rebutted by proof of [the] employer's good faith or the absence of anti-union animus.'' *NLRB v. Allied Products Corp*., 548 F.2d 644, 652 (6th Cir. 1977).

To be sure, both the Board and the circuit courts of appeals have acknowledged that the prior notice requirement is not so absolute as to be completely without limitation. See, e.g., *Peerless Publications*, 283 NLRB 344 (1987); *NLRB v. Powell Electrical Mfg. Co*., 906 F.2d 1007 (5th Cir. 1990). But that limitation is quite narrow. ''The Act permits no immunity because the employer may think that the exigencies of the moment requires infraction of the statute.'' *NLRB v. Union Mfg. Co*., 200 F.2d 656, 659 (5th Cir. 1963). Here, Respondent has failed to establish even ''exigencies of the moment'' to justify its failure to notify the Union, and afford it an opportunity to bargain about the subject, before effecting the layoffs of October 31 and of November 5 and 6.

In the first place, whatever Respondent's financial situation, it had been under no obligation to present paychecks to the employees on any of the days that it laid them off. Article XV, section 3(b) of the 1987–1990 contract provides that, ''Pay day shall be on Friday of each week.'' No change was made in that provision by the 1990 memorandum of understanding, save perhaps by a provision for providing checks to employees who must leave work early as a result of emergency. Consequently, even accepting Respondent's defense of dire financial straits on those 3 days, before paychecks had to be issued there was time to notify the Union of the situation and to consider alternatives to layoff that it might propose for each of the 2 weeks during which layoffs occurred.

Of course, neither the Board nor its administrative law judges are free to substitute their own subjective impression of proper business decisions. *Super Tire Stores*, 236 NLRB 877 fn. 1 (1987). Nevertheless, it hardly transcends that prohibition to point out that, as an objective matter, alternatives to layoff on October 31 and on November 5 and 6 did exist in the circumstances. For example, given the daily fluctuations in Respondent's financial situation, the layoffs could have been postponed until later during the weeks of October 29 through November 2 and of November 5 through 9, so that it could be ascertained more closely to the actual payday if an economic improvement would occur during the latter portion of those weeks. Or, the Union might have agreed to defer payment for particular days worked so long as the employees were allowed to work on those days without being subjected to layoff. ''Although an employer may properly decide that an economic layoff is required, once such a decision is made the employer must nevertheless notify the Union, and, upon request, bargain with it concerning the layoffs, including the manner in which the layoffs and any recalls are to be effected.'' *Clements Wire*, 257 NLRB 1058, 1059 (1981).

In the second place, whatever situation confronted Respondent immediately before the layoffs had not been an unanticipated one. Franklin R. Sears, then Respondent's counsel, testified that he had discussed the insufficient funds for payroll implications of Respondent's financial situation, in light of the Texas Payday Law, with officials of Respondent ''several times'' before the workweek of October 29 through November 2. Yet, at no point prior to that week did Respondent's officials see fit to raise with the Union the possibility of layoffs due to insufficient funds to cover paychecks

for work performed. Surely McKenzie had been presented with an excellent opportunity to do so: Gattis had been at the Cleburne plant on October 29 and 30, immediately before announcement of the initial layoff. By having failed to raise the subject with Gattis on either date, Respondent has deprived itself of any basis for an ''exigencies of the moment'' contention. Its unilateral action constituted a ''derogation of the Union's right to recognition as the exclusive bargaining representative of the employees.'' *NLRB v. Shannon*, 208 F.2d 545, 547 (9th Cir. 1953).

Building on that unilateral action analysis, the General Counsel contends that a preponderance of the evidence actually shows that Respondent affirmatively utilized the employees' uninterrupted continued employment as a lever to try to coerce them into accepting midterm contract modifications. That is, contends the General Counsel, Respondent effectively locked them out to compel their favorable consideration of its proposed concessions, by demonstrating the possible adverse consequences of their failure to acquiesce in its proposed concessions.

The timing of the layoffs is consistent with the General Counsel's contention and, of course, timing can be a persuasive consideration in evaluating the reasons for an employer's action. See, e.g., *NLRB v. Rain-Ware, Inc*., 732 F.2d 1349, 1354 (7th Cir. 1984). Indeed, in the circumstances presented here timing is significant in at least three regards. First, both layoffs—the one on October 31 and the combined one of November 5 and 6—had been preceded by notice to Respondent of either Union or employee unwillingness to unquestioningly acquiesce in the restructuring plan's concessions. Thus, as described above, on October 30 Gattis informed McKenzie that no concessions would be considered before a majority of the unit employees voted to reopen the contract and, even then, the Union wanted to negotiate about any concessions. Virtually within minutes of that conversation the notice of closure on the following day was posted. In like vein, during the afternoon of November 2, after a majority of those employees voted against reopening the contract, Virgie McComas notified Materials Manager Cole of that election's outcome. Before the next scheduled workday—Monday, November 5— notice of a second closure was posted.

Another timing aspect was the relation between the plant's reopening and renewal of appeals to accept contractual concessions. As described above, on November 6 the bargaining committee was summoned to the then-closed plant. There, they were told that the plant would reopen in the overall context of an appeal for another election to reopen the contract. Similarly, although the employees were allowed to first return to work on November 1, at midmorning that day McKenzie assembled them for a meeting during which he effectively appealed for concessions in a context of explaining Respondent's adverse financial situation.

The final aspect of timing is the above-noted absence of an actual relationship between the plant closures and Respondent's defense of insufficient funds to cover paychecks. The first layoff occurred on a Wednesday and the next two occurred on a Monday and a Tuesday. None of those days was a payday. Respondent's payday fell on Friday. At no point did Respondent's officials explain why it had been necessary to notify employees of their layoff during the first half of the workweek because of a possible inability to cover their work with paychecks that would not issue until week's end.

The adverse effect on Respondent's defense of the lack of such an explanation is magnified by examination of daily cash availability reports on which McKenzie claimed that he had relied in making the layoff decisions. Only a limited number of such reports were produced during the hearing. However, even that limited number discloses a substantial variance from day to day in estimated cash shortage by the end of a week. For example, a cash shortage on November 2 is projected to be $191,577 on the report for October 30, to be $123,521 on the following day's report, and to be $68,637 on the report for November 1. To be sure, deficits are projected on each day. But given the extraordinary day-to-day declining variance in amount, Respondent never explained why it had been necessary to decide so early in the workweek—on Tuesday in one instance and on Sunday and Monday in the later one—to temporarily layoff employees in anticipation of a cash shortage for paychecks that would not issue until the end of the week.

In fact, the reliability of Respondent's defense is diminished by the very minimal number of daily cash availability reports produced at the hearing. Six of them were introduced: the three above-described ones for October 30 through November 1; one for November 2, showing a cash shortage of $383,739; one for November 5, showing a cash shortage of $310,498; and, one for November 6, showing a cash shortage of $259,690. Of course, the amounts of the shortages are dramatic. But, Respondent had been losing money regularly since June 1989. Absent some evidence of cash availability—or more precisely, of cash shortage—on other days, there is no evidence that the shortages on these 6 days had been relatively greater than ones shown on similar reports for earlier and later days. That is, it cannot be said that these six reports disclose shortages so relatively greater than earlier and later ones that temporary closure, and layoffs incident to such closures, would naturally have been warranted as an objective solution on October 31 and on November 5 and 6.

Indeed, further difficulty for Respondent's defense is posed by closer examination of the six produced cash availability reports. Following the logic of Respondent's defense, its labor cost should have been reduced on those reports after the 1- and 2-day layoffs for the weeks during which those layoffs occurred. There should have been a consequent reduction in the ''FACTORY PAYROLL'' entry on each report following the day of a layoff. That is, had Respondent truly been as concerned in late October and early November about its cash availability as it now contends, then its post-layoff reports should have reflected the reduced factory payroll, and concomitant week end cash availability increase, resulting from the layoffs' payroll savings. But the post-layoff reports were never adjusted to reflect the factory payroll savings which Respondent now claims had motivated those layoffs. Instead, the entry ''FACTORY PAYROLL 11/2'' lists an amount of $54,552 on all three reports for October 30 and 31 and November 1. Similarly, the report of November 2 lists ''FACTORY PAYROLL 11/9'' as amounting to $37,705 and so too do the reports for that figure on November 5 and 6. Given the effect of not having to pay employees for days when the plant had been closed, surely that figure should have been reduced for days on and after the closures, since the reports were prepared first thing each morning. And

had Respondent truly been concerned about its labor cost at the time of the layoffs, surely it would have been certain to reflect the costs saved by them on its cash availability reports. The fact that no such reduction was made on the reports for October 31 and for November 1, 5, and 6 tends to undermine Respondent's argument that, during the weeks of October 29 through November 2 and of November 5 through 9, it had truly been concerned with the cost of labor and with its ability to issue paychecks for which funds were available to pay employees for time worked.

Failure to have contemporaneously adjusted factory payroll is not the lone discrepancy in Respondent's defense. McKenzie testified that his layoff and recall decisions had been based upon the financial situation reflected by the daily cash availability reports. Accordingly, those reports should be dispositive of Respondent's daily available cash under McKenzie's portrayal of the situation at that time. However, Controller Henderson hedged when questioned about the extent to which McKenzie could have relied upon cash availability reports as a complete measure of daily available cash:

> My people prepare the reports and then I work with Joe. I talk to him about them. For instance, on cash, I let him know at all times how tight the situation is, because the report might say one thing but it's completely different when you take everything into consideration.

Obviously, Henderson's testimony is logical. But, if truthful, it undermines McKenzie's testimony that his reason for deciding to temporarily close and layoff employees had been based on Respondent's cash situation as revealed solely by the daily cash availability reports. If nothing else, McKenzie's testimony fails to disclose whatever other information might have been conveyed to him by Henderson and, accordingly, only partially reveals the reason for his decision. In fact, Respondent produced no evidence of daily cash availability beyond that revealed by the daily cash availability reports.

Possibly a fourth aspect of timing is suggested by Respondent's reliance on the advice of Attorney Sears concerning the payday statute. It appears to take great solace in its defense from the fact that it had received an attorney's advice supporting the closure and layoff decisions. Yet, Sears did not claim that he had made a personal analysis of Respondent's books. So far as the evidence shows, his advice had been based solely upon what he had been told about Respondent's financial situation by its officials, especially by McKenzie. In consequence, attorney's advice adds nothing to Respondent's defense.

As discussed above, however, Sears had provided advice about the Texas statute by the week of October 20 through 24. Yet, McKenzie made no mention of it during his meetings with Gattis on the first 2 days of the immediately following week, even though those meetings were devoted to a review of Respondent's financial situation. Seemingly, given the proximity of his meetings with Sears and Gattis, McKenzie would have said something to the latter about what the former had said about the payday statute. Especially should this have been the fact during the afternoon of October 30. For, consistent with Henderson's practice of preparing cash availability reports each morning, by then McKenzie would have possessed the October 30 cash availability report that he now claims had been the basis for the layoffs resulting from the closure on October 31. Yet, McKenzie did not claim that he had said anything about that decision to Gattis on October 30 and McKenzie never explained why he had not done so. In these circumstances, it is a fair inference that the payday law became significant only after Respondent had laid off the employees and needed to construct a legitimate defense for having done so.

In the final analysis, it is not necessary to rely exclusively on circumstantial evidence to evaluate the purpose for the October 31 and November 5 and 6 plant closures and layoffs. Former Personnel Manager Cathy Stevens testified that, immediately following conclusion of McKenzie's October 30 meeting with Gattis and Hendrickson, there had been a brief meeting of certain management officials: herself, McKenzie, Cole, and a representative of Duncan Smith Investment Group, whose name Stevens could not remember, but whom she described as being short, slender, dark-haired and wearing glasses. At that meeting, testified Stevens, McKenzie had described what had occurred during his meeting with Gattis and Hendrickson and, then, had asked, ''what do we do now [?]'' According to Stevens, the unidentified man retorted: ''Let's shut it down and let them think about it,'' to which McKenzie ultimately replied, ''Okay, let's do it,'' and directed that a layoff notice be posted.

McKenzie testified that he never heard anyone make the statement attributed by Stevens to the individual whose name she could not remember. Indeed, the record discloses several problems in connection with her testimony. For example, by the time that she testified she had been laid off for economic reasons by Respondent. Such a layoff could lead an individual to provide hurtful testimony against a former employer. See, e.g., *McDonnell Douglas Corp.*, 307 NLRB 536 (1992). In addition she had come to the General Counsel's attention as a witness through her prehearing communication with former Union Vice President Sherrie Barber who, herself, appeared as a witness in support of the General Counsel's complaint. Seemingly, most significant was Stevens' inability to identify the individual to whom she attributed the offending remark. Pressed on this point during recross examination by counsel's suggestion of the name Goodhue Smith, Stevens testified, ''I think that was his name. I knew it was a strange name.'' Yet, both McKenzie and Henderson described Goodhue Smith as a tall man, weighing close to 200 pounds, who did not wear glasses.

Stevens' agreement to Goodhue Smith's name was made in response to counsel's selection of it and, as the above quotation shows, was only tentative. It did not represent a firm identification. Moreover, McKenzie acknowledged that Goodhue Smith had not been the lone Duncan Smith official with whom Respondent had dealt. In any event, McKenzie admitted that Goodhue Smith, in fact, had been present during the October 30 management meeting when the decision had been made to lay off the employees on the following day. Although McKenzie testified that all he recalled Smith having said about the layoffs had been ''if we can't meet payroll, then we have to shut the plant down,'' Smith, himself, was never called as a witness by Respondent to corroborate that testimony by McKenzie, nor to contradict that of Stevens. And as he was not called as a witness, it was not possible to compare his actual appearance with the descriptions of McKenzie and Henderson. At no point did Re-

spondent represent that Smith was not available to it as a witness. To the contrary, in the course of testifying, McKenzie admitted that he had spoken with Smith that very morning and that the latter had been in San Antonio. At no point did McKenzie claim that Smith had said that he was not able to make the relatively brief air trip from that city to Fort Worth to appear as a witness on Respondent's behalf and to demonstrate that he was being correctly described by McKenzie and Henderson.

Stevens appeared to be testifying candidly. Her account of what a Duncan Smith representative had said on October 30 tends to be reinforced by the uncontroverted description of a statement to Gattis by Cole during their November 14 negotiating meeting. When Gattis pointed out to Cole that the two closures had harmed the possibility of working out a compromise, because they had led employees to feel that they were being forced, Cole replied ''that he regretted that, that it probably could have been handled differently,'' and, further, ''that Mr. McKenzie had not dealt with unions before and probably was not aware that you can't just unilaterally force things.'' As was true of Smith, Respondent did not call Cole as a witness, but never represented that he was unavailable to testify. Accordingly, not only did Cole not deny having made those statements, but no explanation was provided of statements that, on their face, constitute an admission that McKenzie had laid off the employees to ''unilaterally force'' their acceptance of proposed modifications of their bargaining agent's contract with Respondent. Indeed, consistent with Cole's statement to Gattis, McKenzie conceded that initially he had not been active in Respondent's affairs and that he had become ''more and more involved'' in its affairs only as Respondent's financial situation became progressively more perilous.

In view of the foregoing considerations, a preponderance of the credible evidence supports the allegation that, in essence, Respondent locked out its employees on October 31 and on November 5 and 6 to coerce them into consenting to reopening and agreeing to modify the terms and conditions of the existing collective-bargaining contract. This is not allowed by the Act.

One ''broad policy of the national labor law . . . is to foster productive and peaceful industry self-regulation.'' *Vienna Sausage Mfg. Co.*, 252 NLRB 1317, 1319 (1980). ''Industrial stability depends in part on the binding nature of collective bargaining agreements.'' *NLRB v. Keystone Consolidated Industries*, 653 F.2d 304, 307 (7th Cir. 1981). In recognition of that fact, Congress has provided in Section 8(d) of the Act that the duty to bargain collectively

> shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in the contact for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

That is, ''the policy behind the Act requires that no change in those terms and conditions be made without the express consent of the employees through their union.'' *NLRB v. Keystone Consolidated Industries*, supra. More pertinently in the context of what has occurred in this case, ''[t]he duty to bargain in good faith . . . requires that the parties honor the agreement without demanding bargaining over changes until the period specified in Section 8(d).'' *Zimmerman Painting & Decorating*, 302 NLRB 856 (1991).

To be sure, as it points out, Respondent did not lay off its employees on any days other than the three enumerated in the complaint and, further, did not do so after a majority of them had voted against contractual concessions on November 14. Yet, absence of retaliatory layoffs after that date and failure to lockout employees on additional dates do not render lawful the 3 days of lockout that Respondent did effect. Unlawful conduct is not immunized simply because a respondent could have, but did not, commit unfair labor practices on a broader scale. See, e.g., *Dover Resources Co.*, 307 NLRB 1236 (1992), and cases cited therein.

Furthermore, with regard to employee layoffs. Repondent's latitude was restricted. McKenzie testified that even temporary closures might have led customers and suppliers to fear that Respondent was about to fold and, accordingly, might have caused some to abandon Respondent in favor of alternative business relationships with more lasting promise. As a result, with respect to layoffs to compel acquiescence in contract modifications, Respondent was obliged to proceed with caution. Its position had not been unlike that of a pitcher who tries to reduce a batter's access to the outside of home plate: he must try to move the batter back from the plate with a brush back pitch close enough to get the batter's attention, but not so far inside that he hits the batter and puts him on base. So too, Respondent had to lockout its employees long enough to get their attention—and, hopefully, secure their agreement to reopen the contract and acquiesce in its modification—but not so long that the temporary closures would come to suppliers and customers' attention and lead them to cease doing business with Respondent. And, obviously, once a majority of unit employees had voted against Respondent's proposed concessions, it had nothing to gain, and possibly much to lose, by retaliatory layoffs.

Therefore, I conclude that Respondent violated Section 8(a)(5) and (1) of the Act by closing its plant and by laying off its employees on October 31 and on November 5 and 6, 1990, thereby effectively locking out those employees to compel their agreement, and that of their bargaining agent, to contract modifications during the fixed term of that contract.

B. *Denial of Extended Lunchbreak for Thanksgiving 1990*

McKenzie testified that, prior to Thanksgiving 1990, supervisors had reported that one or two employees had inquired if their Thanksgiving lunchbreak would be extended by 15 minutes. He further testified that he had made the decision to deny that request. That decision, testified McKenzie, had been made because his review of the collective-bargaining contract disclosed no provision for an extended Thanksgiving lunchbreak, because ''Cole and some other employees'' had told him ''that some time we had done it and some time we hadn't,'' and because, after calculating the total production time that would be lost by granting an extended break that day, he had concluded that Respondent could not afford to extend the Thanksgiving lunchbreak:

> I knew that we were in a very precarious cash position and realized also that the more I could move a raw material or work in process through the production flow to a sale, that I was increasing my cash availability, because I was moving from a 45 percent raw material and WIP to a 60 percent finished goods to an 85 percent.
>
> I was trying to get cash. So I told him to deny the request because we couldn't afford to do it at that time.

Respondent does not deny that McKenzie had made that decision, and that it had been implemented, without providing prior notice to the Union and without affording the Union an opportunity to bargain about that decision before it was announced and implemented. Respondent's failure to do so has led the General Counsel to allege that Respondent effected a unilateral change in violation of Section 8(a)(5) and (1) of the Act.

Of course, an employer is not necessarily relieved of its statutory duty to bargain about a particular term or condition of employment simply because there is no mention of it in an existing collective-bargaining contract. ''It is well established that, during the existence of a collective-bargaining contract, a union has a right to bargain about the implementation of a term and condition of employment, and an employer must bargain about a mandatory subject of bargaining not specifically covered in the contract or unequivocally waived by the union.'' *GTE Automatic Electric*, 240 NLRB 297, 298 (1979). Nor is an employer relieved of that statutory obligation because the change is motivated solely by genuine economic considerations. ''It is irrelevant that the company's action was based on compelling economic considerations.'' *NLRB v. W. R. Grace & Co.*, 571 F.2d 279, 283 (5th Cir. 1978).

Respondent contends that the evidence fails to establish that there truly had been a practice of granting a Thanksgiving lunchbreak extension of 15 minutes. Yet, bargaining committee member James Michael Whitehead, who had been employed at the Cleburne plant ''[g]oing on 16 years'' when he appeared as a witness, testified that although the Thanksgiving lunchbreak extension had been granted only ''[m]ost of the time,'' nevertheless the extension ''had been annual for, like I say, the last ten years.'' Aside from McKenzie's above-referenced testimony as to what he had been told by ''Cole and some other [unidentified] employees,'' Respondent presented no particularized evidence refuting Whitehead's seemingly candid description of the Thanksgiving lunchbreak period practice over the course of the preceding decade. Obviously, the Cleburne plant had not been operated by current ownership for most of that period. Yet, McKenzie testified that, in accepting the obligations of the existing collective-bargaining contract, ''I wanted [Respondent] to continue in the tradition that it had,'' and part of that tradition had been a number of consecutive years during each of which employees had been awarded a 15-minute extension of their Thanksgiving lunchbreak. Indeed, Respondent did not dispute Whitehead's specific testimony that, ''The first year that the new company had taken over, we were granted it.''

That, however, does not end consideration of Respondent's 1990 change in the Thanksgiving lunchbreak practice. For, among Respondent's arguments concerning that break is one directed to the nature of the subject matter. That is, Respondent argues that the employment term changed at Thanksgiving of 1990 was only a de minimis or ''token item.'' In fact, that characterization appears apt and, moreover, pertains to an aspect of unilateral change analysis that is dispositive of the General Counsel's allegation concerning denial of the extra 15-minute break in 1990.

''The Board has recognized that not every minor unilateral change in working conditions constitutes an unfair labor practice. To violate Section 8(a)(5), the change in working conditions must be 'material, substantial and significant.''' *Xidex Corp. v. NLRB*, 924 F.2d 245, 253 (D.C. Cir. 1991). ''For a unilateral change to be unlawful, it must be 'material, substantial and significant.''' *Litton Systems*, 300 NLRB 324 (1990). A preponderance of the evidence fails to support a conclusion that elimination of a 15-minute extension of lunchbreak on one occasion in 1990 satisfies that test.

Neither the Board nor the circuit courts of appeals have enunciated a formula for measuring the materiality, substantiality and significance of changes in employment conditions. However, certain factors or areas for scrutiny have been identified for making such evaluations. In rejecting the General Counsel's argument that loss of ''a grace period of a couple of minutes,'' as a result of installation of a buzzer system to signal break endings, was material, substantial and significant, the Board held in *Litton Systems* that, ''[b]ecause any change pursuant to the buzzer system did not have a meaningful impact on the employees' terms and conditions of employment, we dismiss the allegation.'' Here, Respondent's change involved but a few minutes of extended break time on a single occasion and, in the overall content of its relations with its employees, appears ''not [to] have a meaningful impact on the employees' terms and conditions of employment.'' Certainly, there has been no showing that Respondent intended, or had even considered whether or not, to deny the extended lunchbreak for Thanksgiving in succeeding years.

It is accurate that Respondent had also told the employees that there would not be an extended lunchbreak on Christmas. Yet, there is no allegation that there had been an actual denial of that particular extended break. Nor is there an allegation that announcement of its discontinuance in 1990 had violated the Act in any respect. In fact, there was no litigation whatsoever concerning the Christmas lunchbreak. Consequently, any denial of an extended Christmas lunchbreak neither adds to or detracts from analysis of the denied extended lunchbreak for Thanksgiving. The latter must be analyzed without regard to what may or may not have occurred a month later.

To be sure, as concluded in subsection III.B, supra, and in subsection III,D, infra, Respondent denied the extended Thanksgiving lunchbreak in a context of prior and subsequent unfair labor practices. Nevertheless, of themselves, the existence of other unlawful actions does not necessarily serve to elevate employment terms that are not material, substantial and significant to the status of ones that do attain that level.

Had the denial of an extended lunch period been an element in an overall campaign to intimidate employees, or had it been the product of some other unlawful motivation, the situation would be different. ''Had the lunch break change occurred in isolation, with no other manifestation of the employer's opposition to the union, we might be more inclined to conclude that the two-day lunch break change did not constitute an independent violation of the Act.'' *Xidex Corp. v.*

NLRB, supra at 14. But, in contrast to the complaint's allegation of a lockout to unlawfully compel employees into reopening and modifying the contract, no similar allegation is made concerning Respondent's reason for denying a 15-minute extended lunchbreak for Thanksgiving in 1990. Indeed, in her brief, counsel for the General Counsel disavows specifically any such contention predicated upon Respondent's reason for the denial:

> As the Complaint does not allege that McKenzie's refusal also violated Section 8(a)(3) of the Act, Counsel for the General Counsel will refrain from discussion of whether the refusal could be interpreted as retaliation against the employees for refusing to agree to Respondent's proposed concessions.

Furthermore, the record does not disclose any natural nexus between Respondent's decision to deny an extended 1990 Thanksgiving lunchbreak and the events at issue in the immediately preceding and subsequent subsections, such that it can be concluded that the former was related to the latter—that the Thanksgiving lunchbreak decision was an integral component of an overall series of actions intended to interfere with, restrain and coerce its employees' exercise of statutory rights. Nor, for that matter, does the record disclose any ''other manifestation of [Respondent's] opposition to the [U]nion.'' Id.

In sum, the change pertained to an employment term that had no relation to work performance or other employment-related factors. It was not unlawfully motivated nor part of an overall scheme to undermine support for the Union. There is no evidence that it represented a permanent change in Respondent's approach to extended Thanksgiving lunch periods and that it effected a permanent alteration of the employee-employer relationship. Rather, so far as the evidence shows, the change was of slight and limited duration, with limited impact and effect on the employees' terms and conditions of employment. Therefore, I conclude that the General Counsel has failed to establish that a single denial of a 15-minute extended lunch period constituted a material, substantial, and significant change that violated Section 8(a)(5) and (1) of the Act.

D. *The 1-Week Change in some Unit Employees' Work Schedule*

A contrary result is warranted with regard to the allegation that, on or about November 27, 1990, Respondent changed certain employees' hours of employment. In its brief, Respondent concedes that ''it is undisputed that from Tuesday, November 27 until Monday, December 3, 1990, certain employees in Respondent's paint shop and on its conveyor line worked four 10-hour days rather than five 8-hour days, as they had previously worked.'' However, Respondent contends that the collective-bargaining contract permitted it ''to change these employees' schedules, on a temporary basis, at its discretion,'' and, further, that a bargaining committeeman and the Union's financial secretary had been given prior notice of the change and had agreed to it.

In support of its first argument, Respondent points to article IV, section 1 of the contract, the management rights provision, which accords to Respondent ''sole and exclusive rights, duties, and responsibilities to direct the operations of the employer and its working force,'' including explicitly ''schedules of production.'' The difficulty with that argument is that at no point in article IV, section 1, nor at any other place in the contract, is Respondent allowed to exercise contractual management-rights to the extent of nullifying or rewriting other specific provisions of the contract. That is, there is no evidence that the management rights clause entitled Respondent to make midterm modifications in express contractual provisions.

In that regard the General Counsel points to article XV, the portion of the contract pertaining to hours of work and overtime. Its preamble provides specifically that, ''The regular work week for all employees shall consist of five (5) consecutive eight (8) hour days exclusive of meal time, Monday through Friday.'' In addition, section 3(d) of that article states, inter alia: ''There shall be an established starting and quitting time. This time shall not be changed unless at least five (5) working days advance notice is given.'' Respondent's notice to employees announcing the change stated, ''The Paint & Conveyor Line Departments will work 4 - 10 hour shifts (Monday thru Thursday). The Departments will NOT work on Friday.'' On its face, that notice announces a modification of the above-quoted provisions in article XV.

However, Respondent argues that, notwithstanding the above-quoted provisions, the contract did allow it to make temporary schedule changes in the workweek. For over a decade Attorney Franklin R. Sears had represented Respondent's predecessor in negotiating collective-bargaining contracts with the Union. He testified that, in connection with a change in 1984 that eliminated, inter alia, daily overtime independent of calculating total weekly time in excess of 40 hours, the Union's representative had agreed to allow the company ''the flexibility to change the work week around, some departments going to four ten-hour days as opposed to five eights'' and, moreover, to allow such changes to be made without prior notice. No evidence was presented to contradict that testimony, although there was no representation of unavailability of union representatives who had participated in the 1984 negotiations described by Sears.

Nonetheless, as the General Counsel points out, Sears admitted that the Union's agreement to allow those changes was never spelled out in the contract. Nor is permission to change the workweek necessarily inferred from the changes made in article XV, section 3(a), the contractual provision to which Sears referred in describing the Union's agreement to allow workweek changes to be effected. In contracts prior to 1984 that provision read:

> Hours worked in excess of eight (8) during any single regular work day. (A work day is defined as a calendar day.) All hours worked in excess of forty (40) during given work week will be paid for at the rate of time and one-half.
>
> All work performed on Saturday will be paid for at the rate of time and one-half.
>
> All work performed on Sundays and all work in excess of twelve (12) hours during any day will be paid for at double time the straight time rate.
>
> Daily and weekly overtime will not be pyramided for purposes of computing overtime pay.

In the contract negotiated during that year and in the most recent one, that subsection reads:

> All hours worked in excess of forty (40) during a given work week will be paid for at the rate of time and one-half (1 1/2).
>
> All work performed on Saturday will be paid for at the rate of time and one-half (l 1/2) provided that the employee has worked all other scheduled hours of employment during the work week.
>
> All work performed on Sundays will be paid for at double-time the straight-time rate.

Neither the remaining language nor the language omitted as of and since 1984 allows even an inference that the contract permits modification of the express terms of the preamble of article XV and of its section 3(d).

In any event, comparison of Sears' testimony with Respondent's November change shows that the former's description of the Union's agreement does not apply to the workweek change made by Respondent at that time. Sears testified that the Union had agreed only that there would be ''[n]o notice requirement on a temporary change.'' He described the parties' agreement as to what would constitute a change regarded as temporary as having been ''anything that was a work week or less was just simply considered to be a temporary change.'' More specifically, in describing the particular agreement of the Union's representatives in 1984, Sears testified:

> For a week or less, he said that, you know, people can generally make temporary accommodation. But he said, ''If we're going to do this—if the company is going to change departments to four tens for more than a week, then they would expect to have this notice.''
>
> This is basically what we went through in the course of negotiating and ultimately agreeing to the change.

To be sure, Respondent's 10-hour workdays lasted for no more than 5 workdays. However, the record shows that that had not been its intended duration when initially announced and implemented. Lighting Supervisor Bonny Fowler testified that Respondent had planned ''to start it on the 3rd, I think, of December and run it through for 30 days till January 3rd.'' In fact, before actually implementing the change, Respondent's supervisors directly approached each employee who would be affected and requested each one to sign an agreement consenting to the change: ''I _____ agree to work 4 - 10 hour shifts per day (Monday thru Thursday). 10 hour shifts will start December 3, 1990 and end January 3, 1991.'' Accordingly, regardless of an agreement permitting Respondent to unilaterally make workweek schedule changes of no more than 5 days, a more prolonged period for the November workweek change was contemplated by Respondent when it announced and initially implemented that change. Consequently, any informal understanding about notice regarding 5-day or less workweek changes is inapplicable to the change implemented in November. That situation is not altered by the fact that happenstance later altered the actual duration of Respondent's originally announced change.

Respondent further argues that it gave advance notice of the change to the Union's financial secretary and, also, to a member of the Union's bargaining committee. Moreover, argues Respondent, not only was there no request to bargain about it, but the ''Union representatives in fact agreed to the temporary schedule change.'' That argument could have merit when applied to a unilateral change in noncontractual employment terms and conditions. However, it is not an adequate defense to the midterm modification of contract terms which occurred here. ''If the mandatory subject of bargaining which the employer wishes to change is the subject of a provision in a collective bargaining agreement, the employer commits an unfair labor practice if it changes that condition without the permission of the union.'' *Standard Fittings Co. v. NLRB*, 845 F.2d 1311, 1315 (5th Cir. 1988). That permission is not deemed to have occurred simply because an employer directly approaches each unit employee and secure oral or, as here, written agreement of each one to make the modification. To the contrary, of itself, such conduct violates the Act because it constitutes direct bargaining with represented employees in complete disregard of their designated bargaining agent. See *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 674, 684 (1944).

Even the evidence construed most favorably to Respondent's position fails to support a conclusion that it had secured the statutorily required permission to the November-December workweek schedule modification. Fowler testified that both Whitehead and financial secretary Aldredge, the two union officials approached about the change, had said that they would work the new schedule without filing a grievance about it. Whitehead denied having told that to Fowler. And the fact that he immediately did file a grievance concerning the change tends to reinforce that denial and to refute Fowler's description of Whitehead's purported agreement to it. However, the crucial consideration is that Fowler conceded that he had discussed the change with Whitehead and Aldredge ''as employees asking them to work[.]'' Further, it is not controverted that before any of Respondent's officials spoke to Whitehead about the change, they had already spoken with two or three other employees about it. Thus, Whitehead testified, without contradiction, that ''they come to me about third or fourth [regarding the intended change].'' In short, the evidence fails to show that Respondent had been attempting to negotiate with Whitehead and Aldredge. When its officials discussed the change with Whitehead, they had been doing so not because of his bargaining committeeperson status, but instead had been seeking his agreement to accept a work schedule change as one of a number of employees affected directly by that change. There is no evidence that the approach to Aldredge had been intended or carried out any differently.

Although Aldredge occupied the position of union financial secretary, there is no evidence whatsoever that her position authorized her to negotiate and conclude agreements to modify the existing collective-bargaining contract's terms and conditions. To be sure, contracts for the Cleburne facility had been signed on behalf of the Union by, inter alia, bargaining committee members. Yet, there is no evidence that a single committee member, such as Whitehead, possessed authority to negotiate modification of contract terms, simply because he had been one of a number of signatory committee members who had participated in negotiation of that contract. Consequently, even had Fowler truly described Whitehead's purported consent to modification of the contractual workweek schedule, there is no evidence that, in the cir-

cumstances, Whitehead had authority to bind the Union, the bargaining agent for all unit employees, to midterm contract changes. Nor did any of Respondent's officials claim to have personally believed that Whitehead, on his own, possessed authority to strike midterm modification agreements on behalf of the Union.

Therefore, I conclude that a preponderance of the evidence supports the allegation that Respondent violated Section 8(a)(5) and (1) of the Act by its change in the workweek schedule in November 1990.

E. *Refusal to Continue Honoring the Checkoff Provision*

The 1987–1990 collective-bargaining contract contains two provisions pertinent to the General Counsel's final allegation. The first is article XX which requires that voluntarily executed dues-checkoff authorizations be honored and that the money deducted from wages be remitted to the Union. Respondent admits that it ceased doing so after April 25, 1991. In contesting the General Counsel's resulting allegation that the cessation violated Section 8(a)(5) and (1) of the Act, Respondent contends at the outset that the contract terminated on that date and, accordingly, so too did its obligation to honor the checkoff provision. See *Bethleham Steel Co. (Shipbuilding Div.)*, 136 NLRB 1500, 1502 (1962).

Article XXIII of the 1987–1990 contract, the second one pertinent to this particular allegation, provides:

> This Agreement replaces all other prior Agreements between the Company and the Union and shall be in effect and binding on both parties hereto from the 25th day of April, 1987, through the 25th day of April, 1990, and shall continue year to year thereafter unless notice is given in writing by either party to the other of the desire to amend, change or terminate this Agreement. Then and in that event, said notice shall be given at least sixty (60) days prior to the 25th day of April, 1990, or sixty (60) days prior to any yearly anniversary date thereafter.

As described in subsection III,A, supra, in 1990 the parties executed a memorandum of understanding, extending that contract with modifications. That memorandum provides that, ''The current labor agreement will be modified as stated in the following agreement.'' With regard to the contract's modified duration, the memorandum states:

> (2) Current contract with agreed modification will be extended and remain in effect until April 25, 1991, at midnight.
>
> If either party desires to amend, change or terminate this agreement, then in that event said notice shall be given at least sixty (60) days prior to the 25th of April, 1991.

Respondent contends that article XXIII's ''evergreen'' language perished when the parties reopened the 1987–1990 contract and, after the memorandum's execution, contract termination became governed exclusively by the above-quoted language in that memorandum—language which makes no provision for automatic renewal after April 25, 1991. However appealing or unappealing that argument may appear, it is not necessary to address it. For, a preponderance of the evidence supports one of Respondent's alternative arguments: that sufficient ''notice [was] given at least sixty (60) days prior to the 25th day of April, 1991,'' and, as a result, precluded any automatic renewal that otherwise could nor might have occurred under the memorandum's terms.

Respondent's vice president of manufacturing, Michael A. Morris, sent an undated reopening letter which the Union admittedly received. There is no contention that the letter had been substantively inadequate to prevent contract renewal, had it been timely. However, Gattis testified that the Union had not received that letter until the late morning of Tuesday, February 26, 1991, less than 60 days before April 25, 1991, and, in consequence, too late to satisfy the memorandum's stated timeliness requirement.

To be timely in preventing automatic renewal of a collective-bargaining contract, a reopening notice must not only be timely sent, but also must be actually received by the other party before the contractually specified renewal date. See, e.g., *Se-Ma-No Electric Cooperative*, 284 NLRB 1006 (1987). Respondent does not contest that, in accordance with that principle, a reopening notice would be untimely if actually received by the Union on February 26, 1991, nor that, to be timely, its letter had to be received by the Union no later than Sunday, February 24, 1991. However, it argues that I should not credit Gattis' testimony that Morris' letter had not been received by the Union until Tuesday, February 26, 1991. I agree.

When testifying about this matter, Gattis did not appear to be doing so candidly. He claimed that at approximately 11 a.m. on Tuesday, February 26, 1991, he had observed the postman enter the union hall where Gattis' office is located and leave the mail with a clerical who, in turn, brought to Gattis the letters addressed to him. One of those letters, claimed Gattis, had been the reopening letter from Morris. After opening it, testified Gattis, he had shown it to Leroy Brannom, a sister local's bargaining committeeperson and an individual with whom Gattis had been conversing when the mail had arrived that morning: ''a fellow named Leroy Brannom was there in my office, a member from 370. I showed it to him and let him read it.'' In addition, Gattis testified, ''I may have shown it to Neal Catlett, the president of Local 370.'' Gattis further testified that he had contacted bargaining committee president Shivers on February 27, had informed Shivers of the letter's receipt, and had ''asked him if he had gotten any notice on it, had the company said anything to him verbally or gave [sic] him any written request, or did he have knowledge of it; and he said he didn't.''

In the course of challenging Respondent's contention that the reopening letter had been placed in the mail on Thursday, February 21, 1991, the General Counsel criticizes its failure to call Morris as a witness ''to testify regarding why he failed to date the letter, as well as why he waited until Thursday, February 21, 1991, to mail a letter that required receipt by the Union on or before Sunday, February 24, 1991.'' Yet, identical reasoning applies with regard to Gattis' description of his asserted receipt of that letter on Tuesday, February 26, 1991.

Not one of the people to whom Gattis referred in connection with the events surrounding the letter's purported receipt that day was called to corroborate his description of their asserted participation: not Brannom, to whom the letter sup-

posedly had been shown after Gattis opened the envelope and read it; not Catlett, to whom Gattis may later have shown the letter; and, not Shivers, with whom receipt of the letter assertedly had been discussed. True, Gattis testified that Brannom ''had a medical disability'' and ''has a doctor's appointment.'' But there was no representation either that the appointment could not have been changed or that the General Counsel could not have arranged for Brannom to appear as a witness on some other day. And regardless of Brannom's availability, at no point did Gattis testify, nor did the General Counsel represent, that Catlett and Shivers, or either one, had been unavailable to testify as a witness. Yet, neither one appeared to corroborate Gattis' account of their involvement following receipt of Morris' letter.

Furthermore, for so seemingly straightforward a sequence of events, when testifying Gattis seemed unable to put together a consistent description of what had occurred in connection with the purported receipt of Morris' letter on February 26, 1991. For example, he first testified that when he had opened the envelope containing the letter, ''the first thing I noticed'' was that it was undated, adding ''It's the only letter I ever got that way that didn't have a date typed on the face of it.'' But later he retracted that account of having noticed the lack of a date when he had first seen the letter:

> Q. And that the first thing that you noticed was that it was undated; correct?
>
> A. Right. Well, I wouldn't say it was the first thing. No, it wasn't the first thing.
>
> The first thing I noticed when I read it, I though umm, you know. It was in a plain envelope and all. I thought, well, this kind of thing usually comes certified.
>
> I looked and I said, ''There's not even a date on it.''

Similarly, in the course of explaining why he did not have the envelope in which Morris' letter had been received—and which might have shown a postmark consistent with Respondent's evidence that it had been mailed from Cleburne on February 21, 1991—Gattis initially testified that he had thrown away the envelope after opening it and removing the letter from it: ''I make a habit of when I open mail, I've got a wastecan there, you know; and when I first got the letter, I thought it was to do with some grievance that we had.'' However, further cross-examination pursued the subject of the envelope's postmark as potential evidence of the letter's possible untimeliness as contractual notice, with an overtone of unlikelihood that a recipient would discard such potential evidence. And, ultimately, Gattis reversed his initially simple and seemingly straightforward account of the envelope's disposition: ''I don't know when I threw it away. I inadvertently—I may have thrown it like I do my others. But I laid it down there. I let another person read the letter. And I have lost it or misplaced it somewhere.''

No doubt mistakes about a transaction's detail are hardly uncommon and, standing alone, may not necessarily warrant disbelief of a witness' testimony. Here, however, the internal inconsistences in Gattis' testimony reinforce his seeming lack of candor, displayed when testifying, about the letter's receipt. Coupled with that appearance and the lack of any corroboration for his description of the purported events of the mail's receipt on February 26, 1991, when it seemingly was within the General Counsel's ability to provide such corroboration had it existed, they confirm my conclusion that Morris' letter had not been received as late as that date.

That the letter had not been received so late does not demonstrate the converse: that it had been received by Sunday, February 24, 1991. Yet, that Gattis provided testimony lacking in candor about the receipt of Morris' letter is some indication that he was trying to conceal something. See, e.g., *Shattuck Denn Mining Corp. (Iron King Branch) v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). And in the circumstances, that ''something'' could only be the actual date of receipt of Morris' letter. Certainly, Gattis had good reason to avoid acknowledging actual timely receipt of that letter. Given Respondent's past financial condition, there was every likelihood that Respondent would pursue its quest for concessions during negotiations in 1991. Renewal of the existing contract would postpone for another year the Union's need to confront those types of proposals. Indeed, the Union, itself, did not make any effort in 1991 to modify, change, or terminate the contract so that a successive one could be negotiated.

Gattis' lack of candor about the letter's receipt and the Union's motivation for not reopening the contract do not stand alone as evidence, by way of inference, of timely receipt of Morris' letter. Receptionist Angie Nutt testified that she had typed and, after Morris signed it, had posted the reopening letter on Thursday, February 21, 1991. In fact, she testified that she had taken three envelopes, each with one copy of the letter, to the mailroom on that date: one addressed to the Union, another addressed to the Federal Mediation and Conciliation Service, and the third addressed to Respondent's counsel. The last copy was produced during the hearing. The following notation pertaining to its receipt appeared on it: ''Stamped received, February 22nd, 1991.'' There is no basis for concluding that Nutt actually had mailed, or likely would have mailed, that copy on a date other than the day on which she had mailed the copy to the Union. Accordingly, counsel's receipt of the letter on February 22, 1991, renders virtually unassailable Nutt's testimony about the mailing of it and the other two copies, including the one to the Union, on February 21, 1991, 3 days before the final date allowable for timely reopening of the contract.

Of course, as discussed above, it is the date of receipt, not mailing, that governs timeliness of reopening letters. Respondent could have provided proof of actual receipt had its reopening letter been sent by certified or registered mail, or even had it faxed the letter to the Union as it had done with other communications. However, even though either course would have strengthened its position, the Act does not require a party to pursue the best possible course in giving reopening notice. Less than perfection suffices, so long as it is adequate in the circumstances. In that regard, two facts are significant in this case.

First, by later mailing letters from Cleburne that were received on the second day thereafter in Little Rock, Respondent showed that transit of mail between the two sites could be accomplished within 2 days, i.e., by a Saturday for a letter mailed on a Thursday. Second, while Gattis testified that the union hall in which his office is located is not ''normally open on Saturday,'' he conceded that ''If any mail comes on Saturday, then it will [be] there for the following Monday.

We have a mail drop slot that they can stick it through.'' Although actual receipt of a reopening letter is necessary for it to be timely, there is no added requirement that it must be read to be effective. Indeed, such a requirement would only open an avenue for parties to avoid contract reopening by simply leaving unopened envelopes in which such notices are sent. Consequently, so long as Morris' letter had been deposited in the hall where Gattis' office is located, receipt had been perfected.

In the final analysis, given the state of the evidence, there can be no certainty about the actual date of delivery of Morris' reopening letter to the Little Rock union hall where Gattis maintains his office. However, certainty is not the requisite standard of proof in cases arising under the Act. Here, the record establishes that Nutt had posted Morris' letter 3 days before February 24, 1991, that mail posted in Cleburne could be received 2 days later in Little Rock, and that delivery of mail to the site of Gattis' office could have been made on Saturday, February 23, 1991, even though no personnel worked there on Saturdays. Those facts satisfy Respondent's burden under the Act of going forward with evidence of likely receipt of Morris' latter prior to February 24, 1991. Given the Union's seeming desire not to reopen the contract, and confront possible concessions proposals from Respondent, and, further, given the absence of credible evidence showing that the letter had actually been received after February 24, 1991, I conclude that the General Counsel—who bears the ultimate burden of showing every element of a claimed violation of the Act, *Western Tug Corp*., 207 NLRB 163 fn. 1 (1973)—has failed to establish by a preponderance of the evidence that the Union's contract continued in force after April 25, 1991, and that Respondent violated Section 8(a)(5) and (1) of the Act by failing to continue making checkoff deductions after that date.

CONCLUSION OF LAW

Rangaire Acquisition Corporation and GSL Rangaire Corporation d/b/a Rangaire Company committed unfair labor practices affecting commerce by locking out employees on October 31 and on November 5 and 6, 1990, to coerce them into acquiescing to midterm modification of a collective-bargaining contract, and by changing the contractually specified workweek schedule between November 27 and December 3, 1990, without securing agreement to do so from the collective-bargaining agent. However, it has not violated the Act in any other manner alleged in the consolidated complaint.

REMEDY

Having found that Rangaire Acquisition Corporation and GSL Rangaire Corporation d/b/a Rangaire Company engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act. With respect to the latter, it shall be ordered to observe the terms of any collective-bargaining contract with Allied Industrial Workers of America, Local 424—as the bargaining agent of all production and maintenance employees, excluding office clerical employees, draftsmen, engineering technicians, professional employees, guards, watchmen and supervisors as defined in the Act—and to refrain from making changes in those terms before reaching uncoerced agreement to do so with that labor organization. Further, it shall be ordered to make whole all employees in the above-described appropriate bargaining unit for any loss of pay and benefits suffered because they were unlawfully locked out on October 31 and on November 5 and 6, 1990, and because of unlawful changes in their contractually specified workweek schedule from November 27 to December 3, 1990, with backpay to be computed as provided in *F. W. Woolworth Co*., 90 NLRB 289 (1950), and with interest to be paid on the amounts owing as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Rangaire Acquisition Corporation and GSL Rangaire Corporation d/b/a Rangaire Company, Cleburne, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing or modifying contractually specified workweek schedules or any other term and condition of a collective-bargaining contract during its effective term with Allied Industrial Workers of America, Local 424, as the collective-bargaining agent of employees in an appropriate bargaining unit of:

> All production and maintenance employees employed by Rangaire Acquisition Corporation and GSL Rangaire Corporation d/b/a Rangaire Company at its Cleburne, Texas, facility; excluding office clerical employees, draftsmen, engineering technicians, professional employees, guards, watchmen and supervisors as defined in the Act.

(b) Locking out, laying off, or otherwise attempting to coerce employees into accepting changes in the terms and conditions of a collective-bargaining contract during its effective term.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Observe and refrain from making changes during the term of a contract in contractually specified workweek schedules and other terms and conditions of collective-bargaining contracts with Allied Industrial Workers of America, Local 424, as the collective-bargaining agent of employees in the appropriate bargaining unit described in paragraph 1,a, above.

(b) Make whole all employees in the bargaining unit described in paragraph 1,a, above, for any loss of pay and benefits they suffered because they were unlawfully locked out on October 31 and on November 5 and 6, 1990, and because of unlawful changes in their contractually specified work-

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

week schedule from November 27 to December 3, 1990, in the manner set forth above in the remedy section.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Cleburne, Texas facility copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint be dismissed insofar as it alleges violations of the Act not found herein.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''